

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

FEB 18 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERIC S.,)	
)	
Appellant,)	2 CA-JV 2008-0096
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
ARIZONA DEPARTMENT OF)	Not for Publication
ECONOMIC SECURITY, MICHAEL K.,)	Rule 28, Rules of Civil
and CATLIN S.,)	Appellate Procedure
)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD 200800061

Honorable Joseph R. Georgini, Judge

AFFIRMED

John G. Schaus

Mesa
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

E S P I N O S A, Judge.

¶1 Eric S. is the biological father of Catlin S., born in November 2004, and stands in loco parentis, for the purpose of visitation, to Michael K., born in July 2002. On August

20, 2008, after a contested dependency hearing, the juvenile court adjudicated both children dependent as to Eric. On appeal, Eric argues there was insufficient evidence to support the court's ruling. For the following reasons, we affirm.

¶2 Eric and Heather S., the children's mother, lived together from 2002 until December 2006, when Heather ended the relationship and took the children to Missouri. There, Heather and the children moved in with James S., whom she had met in Arizona the previous week. Heather and James married a few months later.

¶3 In February 2007, Eric initiated a paternity action, which became highly contentious custody proceedings that continued for more than a year, and Heather and the children returned to Arizona in April or May. During the custody dispute, Heather alleged Eric might have sexually abused Catlin, and Eric suspected Heather and James had physically abused both children.

¶4 Ultimately, the two reached a custody agreement for alternate-week, shared custody of Catlin, with Eric entitled to in loco parentis visitation with Michael every other weekend. The agreement was reduced to a judgment in the paternity action on May 19, 2008.

¶5 Over the next three days, between May 20 and 22, 2008, Child Protective Services (CPS) received reports that Michael appeared to have been physically abused and that three-year-old Catlin might have been sexually abused. In forensic interviews that followed, the children reportedly implicated Eric as their abuser. CPS took the children into temporary custody on May 22 and placed them with Heather and James, and on May 28, the Arizona Department of Economic Security (ADES) filed an in-home dependency petition alleging Michael, Catlin, and their half-sister Venus, were dependent children. In its petition,

ADES alleged Eric was “unable and unwilling to parent due to: sexual abuse and neglect,” based on Catlin’s statements. ADES also alleged James was “unable and unwilling to parent due to: physical abuse and neglect,” based on “substantiated reports of physical abuse by [James]” and alleged Heather was “unable and unwilling to parent due to: neglect and failure to protect.” As support for its decision to place the children with Heather and James, ADES stated: “Due to the severity of the allegations of sexual abuse by [Eric], ADES believes the children would be at risk if they were placed in the home of [Eric].”

¶6 Heather submitted to the dependency allegations, but Eric contested the petition and also challenged ADES’s placement of Catlin and Michael with Heather and James. After a dependency review hearing on June 6, the juvenile court ordered all three children removed from Heather’s and James’s custody and placed in foster care.

¶7 In August 2008, the juvenile court conducted a three-day dependency adjudication hearing and, at the hearing’s conclusion, permitted ADES to amend the dependency petition to include an allegation that Eric had failed to protect the children.¹ The court found “the burden has been met for failure to protect,” entered a finding of neglect, and adjudged Michael and Catlin to be dependent children. The court further directed ADES to determine whether Eric’s parents, who live in the home with him, were appropriate

¹Eric contends the juvenile court “*sua sponte*, and absent any request from any party, added an allegation against [Eric] of failure to protect.” We disagree. In closing argument, ADES identified and requested the court’s consideration of “the failure to protect issue,” based on the “evidence of [Eric’s] failure to protect during the dependency trial itself.” The court, apparently recognizing this request as a motion to amend, interjected: “The court pursuant to Rule 55(D)(3)[, Ariz. R. P. Juv. Ct.,] can amend the petition to conform to the evidence.”

caregivers and, if so, to place Michael and Catlin in Eric’s custody with Eric’s mother acting as “the safety monitor.” The court addressed Eric directly, stating:

I have heard tons of testimony. The burden is still low. Statements [about abuse by Eric] were made by both kids. Quite frankly, your statement of why you took no action when you had strong reasons to believe that the kids were being excessively beaten. [sic] I understand what you’re saying and I think I’m trusting you with those kids to the point I’m putting them in your custody—your physical custody.

On appeal, Eric contends the court lacked sufficient evidence to find he had failed to protect the children and insists that he “did nothing wrong.”

¶8 To adjudge Michael and Catlin dependent children, the juvenile court was required to find by a preponderance of the evidence that they were “[i]n need of proper and effective parental care and control and . . . ha[d] no parent or guardian willing to exercise or capable of exercising such care and control” based on the allegations in the dependency petition. A.R.S. §§ 8-201(13)(a), 8-844(C). As amended to conform to the evidence pursuant to Rule 55(D)(3), Ariz. R. P. Juv. Ct., and Rule 15(b), Ariz. R. Civ. P., the petition alleged Eric had neglected or abused Michael or Catlin or had failed to protect them. Because the court below was “in the best position to weigh the evidence, judge the credibility of the parties, observe the parties and make appropriate factual findings,” *In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987), we view the evidence in a light most favorable to sustaining that court’s ruling, *see In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994). Furthermore, we will not disturb a dependency adjudication unless no reasonable evidence

supports it. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005).

¶9 Eric maintains “none of the evidence before [the juvenile court] supported or demonstrated that [he] had failed to protect his children.” But he himself testified that during the years he and Heather had lived together he had “seen [Heather] strike Michael on many occasions” and recalled that “she would start yelling and screaming” at Michael so loudly that she could be heard from outside the home. Despite these observations, Eric had nonetheless routinely left the children in Heather’s care while he worked eight- to ten-hour days. He told the court he would return home from work to find both children “running around with saggy diapers” while Heather talked on the telephone.

¶10 After Eric and Heather had separated and become embroiled in the custody dispute, Eric believed Michael and Catlin were being physically abused by Heather or James. But when he had observed noticeable bruises on the children, he had returned them to Heather’s care instead of notifying the police or CPS. Such evidence reasonably supports the juvenile court’s findings of dependency. *See In re Pima County Juv. Action No. 96290*, 162 Ariz. 601, 605, 785 P.2d 121, 125 (App. 1990) (finding of dependency may be based “on one parent’s failure to prevent abuse by another parent”).²

¶11 Eric argues he explained in his testimony that he had not known what to do when he saw the bruises and had been concerned about the effect any child abuse reports

²With respect to Eric’s contention “he did nothing wrong,” we note that “an adjudication of dependency does not require a finding of fault on the part of the parents.” *See In re Santa Cruz County Juv. Action Nos. JD-89-006 and JD-89-007*, 167 Ariz. 98, 102, 804 P.2d 827, 831 (App. 1990) (focus of dependency adjudication not “the conduct of the parents but rather the status of the child”).

might have had on the custody proceeding, particularly because Heather had already accused him of abusing the children. And he points to evidence that, in February 2008, he took photographs of the children's bruises and—after returning the children to Heather—gave the photographs to his domestic relations attorney and sought her advice. But the juvenile court was not required to find Eric's explanation adequate. Because it is not the function of an appellate court to reweigh the evidence, *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005), we decline to do so here.

¶12 We agree with Eric the evidence was not without contradictions and find this a close case. However, given the constraints of our standard of review, we conclude some reasonable evidence supports the juvenile court's determination that Michael and Catlin are dependent children as defined by § 8-201(13). We therefore affirm the court's dependency adjudication order.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge